

RECEIVED

MAR 18 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In re Applications of	)	MM Docket No. 93-87
	)	
RAYMOND W. CLANTON	)	File No. BPH-911216MC
	)	
LOREN F. SELZNICK	)	File No. BPH-911216MD
	)	
For Construction Permit	)	
for a new FM Station on	)	
Channel 279A in El Rio,	)	
California	)	

To: Administrative Law Judge  
John M. Frysiak

REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On behalf of

RAYMOND W. CLANTON

March 18, 1994

Miller & Miller, P.C.  
P.O. Box 33003  
Washington, DC 20033

No. of Copies rec'd  
List ABCDE

*dtg*

Table of Contents

Summary . . . . .	i
Reply Findings and Conclusions . . . . .	1
I. Selznick's original financial qualifications . . . . .	2
II. Selznick's misrepresentation of her financial qualifications . . . . .	8
III. Selznick's current financial qualifications . . . . .	10

## SUMMARY

Clanton replies to the Proposed Findings of Fact and Conclusions of Law filed by Loren F. Selznick. He demonstrates that her Findings contain numerous errors and omit materially significant portions of the record. Selznick provides nothing of substance to counter Clanton's showing that all three issues must be decided against her.

Clanton points out omissions in Selznick's treatment of Issue I. At the time of her certification: (1) Selznick left significant costs out of her budget; (2) Neither Selznick nor Dailey mentioned a specific dollar amount nor any other terms for Dailey's loan; (3) Selznick had no documentation of Dailey's purported loan or of his financial qualifications; (4) Selznick lacked knowledge of Dailey's liabilities.

Selznick's Conclusions on Issue I fail to recognize adverse case law and neglect Commission discussion of the requirement, added in 1989, that applicants have financial documents in their possession at time of certification.

Clanton demonstrates that Selznick was aware when she filed her application that she did not meet Commission requirements for financial qualification. Hence, her certification in the face of such knowledge was a deliberate misrepresentation, requiring her disqualification under Issue II.

Lastly, Clanton shows that Selznick's showing on Issue III, her present financial qualifications, also omits a large

amount of significant record evidence. Moreover, Selznick's Conclusions on this issue are improper for they do nothing more than address her pending petition for leave to amend. The purpose of Conclusions of Law is to analyze the record in light of Commission policy and precedent. By failing to present any such analysis, Selznick has shirked her duty. Clanton's Conclusions, which prove that Selznick is not financially qualified, even were her amendment to be accepted, are not rebutted.

Clanton concludes that Selznick was not financially qualified when she filed her application, that her certification was a deliberate misrepresentation, and that she remains financially unqualified to this day.

RECEIVED

MAR 18 1994

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM Docket No. 93-87
	)	
RAYMOND W. CLANTON	)	File No. BPH-911216MC
	)	
LOREN F. SELZNICK	)	File No. BPH-911216MD
	)	
For Construction Permit	)	
for a new FM Station on	)	
Channel 279A in El Rio,	)	
California	)	

To: Administrative Law Judge  
John M. Frysiak

#### REPLY FINDINGS AND CONCLUSIONS

Raymond W. Clanton, by his attorney, hereby files his reply findings of fact and conclusions of law in the above-captioned proceeding. This document addresses the Proposed Findings and Conclusions of Loren F. Selznick.

1. The burden of proof on all three issues is on Selznick. To prevail, she must persuade the Commission, by a preponderance of the evidence, that she was financially qualified when she submitted her application, that her certification was not a misrepresentation, and that she is financially qualified at present. If the preponderance of the evidence on any of the three issues is not in her favor, Selznick has not met her burden and the issue must be decided against her. Clanton fully demonstrated in his Proposed Findings and Conclusions that Selznick must be disqualified on all three

added issues.

2. Selznick's findings of fact present a highly selective reading of the record; they contain numerous errors and omit materially significant portions of the record. As a result, her conclusions are perforce inadequate. In addition, her conclusions on added Issues I and II fail to recognize adverse case law, and she offers no substantive conclusions on Issue III. Herein, Clanton notes some of the more egregious misstatements in Selznick's Proposed Findings and Conclusions. A failure to mention a particular matter does not necessarily signify agreement, especially when Clanton's own Proposed Findings and Conclusions provide a full exposition thereon. To avoid unnecessarily repeating material fully developed in Clanton's Proposed Findings and Conclusions, citations thereto are made in appropriate instances below.

I. Selznick's original financial qualifications.

3. To meet this issue, Selznick must demonstrate that she has reasonable assurance of the funds necessary to meet the entire cost of the station's construction and initial 3-month operation. Selznick's proposed findings fall woefully short.

4. In paragraph 13 of her findings, Selznick states that she developed a budget of \$360,070. She does not provide, and the record does not contain, the details of the budget, but it is clear that it omits a number of significant items. She failed to account for such necessary costs as freight and

sales tax on her equipment, the cost of her planned move to California, her living expenses until the station had been on the air for three months, and Commission hearing and filing fees. See Clanton's Proposed Findings, paragraphs 10-12. As a result, her cost at the time of filing was many thousands of dollars more than her \$360,070 estimate.<sup>1</sup>

5. In paragraph 42, Selznick states that her application identified Joseph P. Dailey ("Dailey") as the source of funds. She fails to mention that her application states the amount of Dailey's loan as \$361,000. As her budget is deficient, this sum will not meet Selznick's costs when the omitted items are included. Hence, even were the Commission to credit Selznick with as much as \$361,000 from Dailey, she would be well shy of the amount she actually needs.

6. In addition, neither Selznick nor Dailey ever mentioned the figure of \$361,000. In fact, neither Dailey nor Selznick mentioned a specific dollar figure in 1991. Dailey was aware only that Selznick's cost estimate was "slightly more than \$350,000". (Selznick Ex. 4, p. 3) It is clear that Dailey had the figure of \$350,000 in mind when he told her he would "provide the financing." See Clanton's Proposed Findings, paragraphs 13-16, 20. Selznick had no legitimate basis for stating in her application that Dailey had agreed to supply the sum of \$361,000. This fact is a sufficient basis

---

<sup>1</sup> Selznick's claim that she has a substantial cushion because her estimate was high in many cases is unsupported by the record.

to conclude that Selznick was not financially qualified in 1991. Moreover, Selznick's certification to the Commission that Dailey had agreed to lend her specifically \$361,000 was knowingly incorrect. As such, it also constitutes a deliberate misrepresentation and leads to Selznick's disqualification under Issue II as well.

7. Selznick concedes that she had no documentation giving the terms of Dailey's purported loan or describing his financial position in her possession at any time prior to the filing of her application. (Paragraph 16 of Selznick's Findings) She argues that documentation is not required under current Commission policy. Selznick is incorrect. Her failure to have the requisite documentation is fatal to her claim of financial qualifications.

8. In paragraph 47 of her findings, Selznick refers to the Commission's strengthened financial requirements. She notes that the Commission does not require applicants to submit their underlying financial documents with their application. (emphasis supplied.) Selznick seeks to confuse the issue, for the question is not whether Selznick submitted documents with her application. Rather, it is whether Selznick may certify her financial qualifications without having the necessary documents in her possession. As Clanton demonstrated in paragraphs 68-70 of his conclusions of law, it is clear that physical possession of the necessary documents is a condition precedent to certification.



9. In its Report and Order revising Form 301, 4 FCC Rcd 3853 (1989), at paragraph 43, the Commission stated,

as we did prior to 1981, we are now requiring that the applicant have such information and documentation on hand at the time it submits the application... To provide guidance to the applicants on compiling the [cost] estimate and on the funding information an applicant will now be required to have on hand at the time it files an application, we are adding to our current instructions in Section III of Form 301 the instructions formerly used by the Commission to elicit financial qualifications information and documentation. (footnote omitted.)

10. Selznick seeks to draw a distinction between the terms "on hand", as used in the instructions, and "in hand" which she concedes would mean in her physical possession. Selznick cites no authority for her interpretation of the term "on hand" to mean "available upon request". As a practicing attorney, Selznick is presumably familiar with the rule of legal construction that words are to be given their plain meaning unless otherwise defined. She provides no reason for defining "on hand" as other than "in physical possession."

11. The Commission uses the terms "in hand" and "on hand" interchangeably in its aforementioned Report and Order. In discussing the reasons for reimposing the requirement to have documentation, the Commission stated in paragraph 49,

If an applicant must line up funding sources, identify them in detail and have underlying documentation in hand, it may be less likely to file an application merely to negotiate a settlement. (emphasis supplied.)

12. Accordingly, the Commission perceives no difference between "on hand" and "in hand." Logically, there is none.

Both require the person making the certification to have physical possession of the documents.

13. Between 1981 and 1989, applicants were not required to have their financial documentation on hand at time of certification; they could obtain the documentation after a request was made. Northampton Media Associates, 4 FCC Rcd 5517 (1989). The Commission altered this approach in its 1989 Report and Order, at paragraph 51, stating, "[T]hese new filing requirements impose a small additional burden on applicants." (Emphasis supplied.)

14. Selznick improperly attempts to apply the pre-1989 standard for documentation of financial qualifications. As the Commission expressly changed that policy in 1989, well before Selznick's application was filed, her argument is completely unfounded. Selznick's failure to have the documentation of her financial qualifications in her possession at time of certification constitutes yet another basis for deciding Issue I adversely to Selznick.

15. Moreover, as Clanton demonstrated in paragraphs 72-78 of his conclusions of law, Selznick's conversations with Dailey regarding the loan were insufficient to provide reasonable assurance even under the obsolete Northampton standard. Selznick addresses part of this area in paragraph 14 of her findings, where she asserts that she told Dailey in a telephone conversation that her estimated cost was slightly more than \$350,000, and that Dailey agreed to lend her "the

needed funds." In paragraph 17, Selznick asserts that she "understood [Dailey's terms for his loan] from the outset." She continues in paragraph 18, "Dailey could and would loan \$360,070 to Ms. Selznick for the El Rio FM project." From these facts, Selznick argues that she had reasonable assurance, as defined by the Commission. The record does not support her conclusion.

16. Selznick stresses that Dailey went over his financial statement on the telephone "item by item." That term appears in paragraphs 14, 16, 22, and 43 of her Proposed Findings.<sup>2</sup> Selznick's recitation is incomplete. She omits the fact that Dailey did not review his entire financial statement, but stopped when he reported on three assets, his cash, his partnership profits and his partnership inventory interest. Selznick neglects to disclose that there was no mention of Dailey's liabilities. Selznick first obtained information on his liabilities in August 1993 when she received his financial statement of November 1991. That document did not disclose his monthly mortgage payment. Selznick did not learn that figure until she read his deposition.

---

<sup>2</sup> Selznick states that this conversation occurred in "late November or early December 1991." (paragraph 14) There is no mention of December as the time of the call in the record. The date has significance, because, as Selznick admits, Dailey's financial statement of November 30, 1991, was prepared in early December of that year. (paragraph 26). The statement which Dailey viewed while discussing his assets with Selznick could not have been the one appearing as Selznick Ex. 4, Appendix A. There is nothing in the record to show what the statement which Dailey read to Selznick contained.

17. Clanton's Proposed Findings, paragraph 77, contains a full discussion of the need for Dailey's liabilities. Suffice it to say that it is net liquid assets, determined by subtracting current liabilities from total liquid assets, on which the Commission bases its determination of (Selznick's knowledge at time of certification of) Dailey's ability to make the loan. As she failed to ascertain Dailey's current liabilities, Selznick was incapable of confirming that Dailey's net liquid assets were sufficient to allow him to make the loan.<sup>3</sup> Without such confirmation, her financial certification was improper and must lead to her disqualification under Issue I.

## II. Selznick's misrepresentation of her financial qualifications.

18. Clanton's Proposed Findings demonstrate that Selznick's initial financial certification was a deliberate misrepresentation. Nothing in Selznick's Proposed Findings alters that conclusion. To emphasize some of the reasons for finding against Selznick on this issue, it is clear she knew at the time of certification that she had not complied with all the requirements of the instructions. She did not include all costs in her budget, omitting such significant items as sales tax, transportation, Commission fees, and her own moving

---

<sup>3</sup> The Presiding Judge has recently ruled that liabilities are to be considered in determining a potential lender's net liquid assets in Stephen O. Meredith, FCC 94M-155, released March 16, 1994.

and living expenses. Her interpretation of "on hand" with regard to documentation is disingenuous. Her apparent reliance on the Form 301 Instructions for the proposition that she was not required to have Dailey's loan proposal in writing is likely a post hoc approach, for she did not mention the Instructions in her opposition to Clanton's petition to enlarge issues.<sup>4</sup>

19. A further basis for finding against Selznick on Issue II stems from the following. Selznick asserts she read the instructions to Form 301 before completing the form.<sup>5</sup> Paragraph B on page 1 thereof advises the applicant to "have on hand and be familiar with current broadcast rules..." It further states in paragraph F of that page,

Replies to question in this form and the applicant's statements constitute representations on which the FCC will rely in considering the application. Thus time and care should be devoted to all replies, which should reflect accurately the applicant's responsible consideration of the questions asked.

It is clear that Selznick did not follow this admonition.

20. It was incumbent on Selznick to follow carefully all requirements before certifying. She conceded at the hearing

---

<sup>4</sup> It is noteworthy that Selznick does not argue her interpretation of "on hand" with respect to the terms of Dailey's loan.

<sup>5</sup> However, Selznick could not recall reading the requirement to include freight and sales tax charges. (TR 89) It is logical to assume she did not read it, for she failed to ascertain whether her budget included such items. Selznick provides no excuse for disregarding a significant area of the instructions.

that she disregarded the requirement to obtain Dailey's net income for two years. (Clanton Ex. 2, p. 109-110) Selznick knew when she signed her application that she had not followed the instructions to the form. She knew that her financial certification was improper, yet she executed it. Therefore it was a misrepresentation.

21. In this regard, the Commission must consider Selznick's refusal to disclose her communications with her counsel. As Clanton noted in his conclusions of law, paragraphs 82-83, the Commission must find that such communications were adverse to her interest. At a minimum, this matter supports a holding that Selznick did not meet her burden of proof on Issue II.

22. In sum, the record fully supports a conclusion that Selznick certified her financial qualifications knowing she was not qualified. Issue II must be resolved against her.

### III. Selznick's current financial qualifications.

23. Selznick's findings on this issue are quite sparse. She does not itemize her proposed budget and fails to account for discrepancies and omissions which Clanton noted in his proposed findings and conclusions. Selznick ignores the conflict between the antenna proposed in her application and that contained in her budget. (Paragraph 47 of Clanton's findings) She again omits discussion of the cost of her move from New York to California and of her expenses during the

initial three months of operation.

24. In paragraph 31 of her findings, Selznick states that she believes her expenses may be no higher than \$10,000 per month. (Emphasis supplied.) A person's mere belief does not establish the fact upon which the Commission may draw; a mere possibility (as signified by use of the term "may") is not probative evidence. Hence, Selznick's own findings fail to demonstrate the validity of her proposed budget and do not support a conclusion that she is currently qualified.

25. Selznick errs by including her apartments among her "net liquid assets" in paragraph 33 of her findings. Real estate is not a liquid asset. As shown in paragraph 111 of Clanton's Findings, the Commission credits only 2/3 of the appraised value of real property toward an applicant's liquid assets. Port Huron Family Radio, Inc., 5 FCC Rcd 4562 (1990), at n. 5. As a result, Selznick's net liquid assets are reduced by \$68,000. This reduction alone makes her financially unqualified.

26. Moreover, Selznick does not address other matters affecting her current financial showing which Clanton pointed out in paragraphs 112-114 of his Findings. These include her claimed \$8,000 inheritance and her failure to allow for New York State and City income taxes on her retirement withdrawal. This tax question was raised at the hearing, and there is no excuse for Selznick's avoidance of the matter in her Findings.

27. Selznick's conclusions on her current financial

qualifications, paragraphs 63-69, are simply a rehash of her arguments for acceptance of her pending petition for leave to amend. Selznick's petition is not part of the hearing record and her discussion thereof is completely inappropriate. It should be stricken.<sup>6</sup>

28. Selznick's Conclusions offer absolutely no discussion of her current financial status. They provide nothing of substance on which the Presiding Judge may base his decision. Hence, Selznick's conclusions on added Issue III do not meet the requirements for conclusions of law. Her submission could be grounds for dismissal of her application for failure to file proper findings and conclusions. See Section 1.263(c) of the rules. In any event, Selznick has failed to overcome Clanton's showing in paragraphs 96-114 of his Proposed Findings and Conclusions that she is not presently qualified, even were her pending financial amendment accepted.

29. In conclusion, a full and fair reading of the record demonstrates that Selznick fails to meet any of the three qualifying issues added against her. Her application must therefore be denied and a forfeiture levied.


---

<sup>6</sup> Selznick's reliance on Azalea Corp., 31 FCC 2d 561 (1971) as support for acceptance of her amendment is misplaced. The policy that the Commission is lenient on amendments going to basic qualifying issues no longer applies. See, e.g. Premier Broadcasting, Inc., 7 FCC Rcd 867, n. 12 (1992), and cases cited therein.



Respectfully submitted,

RAYMOND W. CLANTON

By   
Jerrold Miller  
His Attorney

March 18, 1994

Miller & Miller, P.C.  
P.O. Box 33003  
Washington, DC 20033

**CERTIFICATE OF SERVICE**

I hereby certify that on this 18 day of March, 19<sup>94</sup>  
a copy of the foregoing document was placed in the United States mail,  
first class postage prepaid, addressed to the following:

Paulette Laden, Esq.  
Hearing Branch, Enforcement Division  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, NW, Suite 7212  
Washington, DC 20554

Robert L. Thompson, Esq.  
Pepper & Corazzini  
1776 K Street, NW, Suite 200  
Washington, DC 20006

Fayeann Beach